Supreme Court, U.S.
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No. 94-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ASHLAND INC.,
Petitioner,
v.
REVENUE CABINET, COMMONWEALTH OF KENTUCKY,
Respondent.

Petition for a Writ of Certiorari to the Commonwealth of Kentucky Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Kentucky's unapportioned imposition of use tax on the full amount of recurring lease payments for aircraft that are both used and stored, in part, outside of Kentucky violates the Constitution.

PARTIES AND AFFILIATED COMPANIES

All parties to the proceeding are listed in the caption. The following is a list of the non-wholly-owned subsidiaries of Ashland Inc.:

A.B. & H. Processing, Inc.
ACS Coal Sales Company, Inc.
Allegheny Land Company
Allegheny Land Company No. 2
Apogee Coal Co.
Arch Coal Sales Company, Inc.
Arch International, Inc.
Arch Mineral Corporation
Arch of Wyoming, Inc.
Ark Land Company
Ashland Coal International, Ltd.
Ashland Coal Sales (Ohio), Inc.
Ashland Coal, Inc.
Ashland Korea Foundry Products, Limited
Ashland Polymers Pty. Limited
Ashland Terminal, Inc.
Ashland-Avebene S.A.
Ashland-Bentonit Resinas Ltda.
Ashland-Sudchemie Giesserei-Chemikalien GMBH
Ashland-Sudchemie Kernfest GMBH
B.V. Ashland-Sudchemie V.H. Necof
Bebe Coal Corporation
Big Sandy Terminal, Inc.
Catenary Coal Company
Catenary Coal Holdings, Inc.
Coal-Mac, Inc.
Cumberland River Coal Company
Dal-Tex Coal Corporation
Donau Drew Handelsgesellschaft M.B.H.
Drennen Tipple Corporation
Drew Ameroid (M) Sdn. Bhd.
Drew Australia Pty. Ltd.
Drew New Zealand Limited
Energy Development Co.

Exaloid S.L.
Filbeth Enterprises, Inc.
Great Lakes Coal & Dock
Hobet Mining, Inc.
Hodogaya Ashland Co., Ltd.
Iberia Ashland Chemical S.A.
Julian Tipple, Inc.
Kernfest-Webac, A.B.
Lone Mountain Processing, Inc.
Mingo Logan Coal Company
Mountain Gem Land No. 2, Inc.
Mountain Gem Land, Inc.
Mountain Mining, Inc.
Mountaineer Land Company
Mountaineer Land Company No. 2
Old Hickory Coal Company
P.C. Holding, Inc.
R & H Service and Supply Co.
Saarcar Coal, Inc.
Servco, Inc.
Sharples Coal Corporation
Tri-State Terminals, Inc.
Tri-State Testing Co., Inc.
United States Coal Company
Webachem Oy

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PETITION FOR A WRIT OF CERTIORARI

Ashland Inc. petitions for a writ of certiorari to review the judgment of the Commonwealth of Kentucky Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Kentucky Court of Appeals (Pet. App. 1a-7a) is reported at 888 S.W.2d 667. The order of the Kentucky Supreme Court denying discretionary review (Pet. App. 8a) is not yet reported. The opinion of the Kentucky Greenup Circuit Court (Pet. App. 9a-13a) is not reported. The opinion of the Kentucky Board of Tax Appeals (Pet. App. 14a-19a) is not reported.

JURISDICTION

The order of the Kentucky Supreme Court denying discretionary review was entered on January 11, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, art. I, § 8, cl. 3, provides in pertinent part:

> The Congress shall have Power . . .
>
> To regulate Commerce with foreign Nations, and among the several States . . . .

The Fourteenth Amendment (Due Process Clause) of the United States Constitution provides in pertinent part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

Kentucky Revised Statutes § 139.310 provides in pertinent part:

> An excise tax is hereby imposed on the storage, use or other consumption in this state of tangible personal property purchased . . . for storage, use or other consumption in this state at the rate of six percent (6%) of the sales price of the property.

STATEMENT

1. As part of its continuing business operations, Ashland leases and operates a fleet of aircraft. The aircraft are based at a public airport in Kentucky, although the lease agreements were entered into and the aircraft were delivered and first used outside of Kentucky. The aircraft are flown primarily outside of Kentucky and spend a significant portion of their ground time being stored at airports in other states. Pet. App. 10a, 17a; Appellant's Trial Exhs. 1 & 2. The lease payments are made on an annual or monthly basis. Pet. App. 16a.

Kentucky imposes an excise tax "on the storage, use or other consumption in this state of tangible personal property purchased . . . for storage, use or other consumption in this state at the rate of six percent (6%) of the sales price of the property." Ky. Rev. Stat. Ann. § 139.310 (Michie 1991). In 1985, Kentucky amended its statutory definitions of "purchase" and "sale" to include "lease or rental." *See* Ky. Rev. Stat. Ann. §§ 139.090, 139.120 (Michie 1991); 1985 Ky. Acts, Ch. 6 (Part III) §§ 6 and 7. The effect of that change was to expand the storage and use tax to include a recurring excise tax assessment on the gross *rentals* paid for tangible personal property rented from an out-of-state lessor for storage or use in Kentucky, as those rentals are paid on a periodic basis. Pet. App. 9a-10a, 14a; Tr. 44.

2. The Kentucky taxing authorities assessed use tax against Ashland on an unapportioned basis, imposing what was then a five percent tax on the full amount of the periodic lease payments made by Ashland for its aircraft. Ashland objected to the tax assessment on the ground that the failure to apportion was unconstitutional because Kentucky was taxing use and storage of the aircraft that occurred in other states. The Kentucky Board of Tax Appeals overruled Ashland's objections, stating only that "the assessment of tax at issue is constitutionally valid." Pet. App. 19a.

Ashland sought judicial review of the Board's decision, and the Greenup County Circuit Court reversed. Pet. App. 9a-13a. The court remarked that "[i]t is black letter law that an unapportioned tax on gross receipts derived from interstate commerce cannot stand." *Id.* at 11a-12a. The court held that the statute should be interpreted to provide for the imposition of the use tax on an apportioned basis, taking into account the flight time and the ground time of the aircraft in Kentucky. *Id.* at 12a-13a.

The Kentucky Revenue Cabinet appealed, and the Kentucky Court of Appeals reversed and ordered reinstatement of the decision of the Kentucky Board of Tax Appeals. Pet. App. 1a-7a. The court dismissed the apportionment objection by stating that no other state "has in fact taxed the leases at issue here or the use, storage or other consumption of the aircraft." *Id.* at 7a. The court also stated that there is "nothing in the record to lead us to believe that any other state would *now* have the requisite substantial nexus necessary to impose a tax." *Id.* (emphasis in original). The court concluded that there accordingly "has been no showing of the risk of multiple taxation that" the fair apportionment requirement "was designed to prevent." *Id.* Finally, the court stated that, if there were multiple taxation, Ashland "would then be entitled to a credit or exemption pursuant to KRS 139.510 as it is applied by the Cabinet." *Id.*[1]

REASONS FOR GRANTING THE PETITION

One of the most fundamental constitutional limitations on state taxation is the principle that a state may not extend its taxing power beyond its borders. The state must "exert[] its power *in proper proportion* to [the taxpayer's] activities within the State and to [the taxpayer's] consequent enjoyment of the opportunities and protections which the State has afforded." *General Motors Corp. v. Washington*, 377 U.S. 436, 441 (1964) (emphasis added). Indeed, the taxation by one state of value or activities attributable to another state violates both the Commerce Clause and the Due Process Clause. "[T]he due process clause denies to the state power to tax or regulate the corporation's property and activities" outside its boundaries. *Connecticut General Life Ins. Co. v.*

[1] The court here was referring to the State's assertion in its brief that it would apply section 139.510 to provide a credit for use tax paid to another state in connection wtih the aircraft leases, even though the statute by its terms provides a credit only for *sales* taxes paid to another state.

Johnson, 303 U.S. 77, 80-81 (1938). And a tax violates the Commerce Clause unless "the State has taxed only that portion of the revenues from the interstate activity which reasonably reflect the in-state component of the activity being taxed." *Goldberg v. Sweet*, 488 U.S. 252, 262 (1989). In accordance with this territorial limitation, the Court has long recognized that, as a general rule, "an unapportioned tax . . . by its very nature makes interstate commerce bear more than its fair share." *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 462 (1959).

The decision below ignores this basic tenet of constitutional law in approving Kentucky's imposition of a recurring, unapportioned storage and use tax on 100 percent of the gross lease payments made for property that is used and stored, in part, outside of Kentucky. This Court should not permit this decision to stand—both because it is so fundamentally at odds with the basic restrictions on state taxation of interstate activity and because the issue is of potentially broad and recurring significance in the many other states that impose use taxes on leased property.

1. The framework for analyzing the constitutionality of state taxation of interstate activity is the familiar four-part analysis of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). To be constitutional, the tax must: (1) be applied to "an activity with a substantial nexus with the taxing State"; (2) be "fairly apportioned"; (3) "not discriminate against interstate commerce"; and (4) be "fairly related to the services provided by the State." *Id.* at 279. This test incorporates requirements of both the Commerce Clause and the Due Process Clause. *See Quill Corp. v. North Dakota*, 112 S. Ct. 1904, 1914 n.7 (1992); *Trinova Corp. v. Michigan Dept. of Treasury*, 498 U.S. 358, 373 (1991).

Kentucky's unapportioned imposition of its use tax on the full value of Ashland's periodic lease payments fails

to satisfy this test. Indeed, although Kentucky plainly has enough of a nexus to impose some tax on Ashland's use of the aircraft, its failure to employ an apportionment mechanism to confine the incidence of the tax to in-state activity encroaches upon each of the other three elements of the standard formulation.

By its terms, the tax is "imposed on the storage [or] use" of the property in question. That activity being taxed, however, does not occur exclusively in Kentucky; it is undisputed that the airplanes are both stored and used outside of Kentucky for significant periods of time. *See* Appellant's Trial Exhs. 1 & 2. In these circumstances, the tax plainly cannot be "fairly apportioned" by apportioning to Kentucky 100 percent of the tax base. Kentucky is not limiting the incidence of its tax to in-state activity with which it has a nexus; the tax in part is being "imposed on the storage [or] use" of the airplanes in other states. *See, e.g., Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653 (1948).

Moreover, the effect of the failure to apportion the tax is that Ashland pays the same tax as would a similarly situated lessor who used and stored its leased planes exclusively within Kentucky. By imposing a greater proportional tax burden on Ashland in relation to its in-state activity, Kentucky's taxation scheme both discriminates against interstate commerce (*see American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266, 290-91 (1987)) and fails adequately to relate the tax to services provided by the State (*see Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 626-27 (1981)).

The fundamental problem with Kentucky's tax—namely, the taxation of out-of-state activity—has been addressed repeatedly by this Court in the context of a gross receipts tax. In *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434 (1939), the Court ruled that the state of Washington could not measure its franchise tax on an in-state corporation by reference to the entire

gross receipts from its sales because that would tax activities attributable to other states. The Court explained that "the tax, measured by the entire volume of the interstate commerce in which [taxpayer] participates, is not apportioned to its activities within the state." *Id.* at 439. Similarly, the Court invalidated Indiana's unapportioned gross receipts tax on a domestic manufacturer that sold some of its products to customers in other states. *J.D. Adams Manufacturing Co. v. Storen*, 304 U.S. 307 (1938). The Court criticized the tax as "includ[ing] in its measure, without apportionment, receipts derived from activities in interstate commerce." *Id.* at 311.

This territorial limitation on state taxation is well illustrated by *Central Greyhound Lines, Inc. v. Mealey, supra.* In that case, New York imposed an unapportioned gross receipts tax on a bus company that transported passengers between points in New York, but over routes that used highways located in neighboring states. This Court held that, consistent with the Constitution, the tax could be imposed only on the amount attributable to the company's activity in the state, which required an apportionment based on the mileage travelled in the various states. The Court observed that "[b]y its very nature an unapportioned gross receipts tax makes interstate transportation bear more than 'a fair share of the cost of the local government whose protection it enjoys.'" 334 U.S. at 663, quoting *Freeman v. Hewitt*, 329 U.S. 249, 253 (1946). Accordingly, an unapportioned gross receipts tax is valid only where all the receipts are attributable to intrastate activity, in which case the tax is "'apportioned exactly to the activities taxed,' all of which are intrastate." *Standard Pressed Steel Co. v. Department of Revenue*, 419 U.S. 560, 564 (1975), quoting *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. at 440.

Kentucky's use tax is measured by the lessor's gross receipts from the rental of its aircraft to Ashland, but it

is not literally a "gross receipts tax" because it is imposed on the lessee, not the lessor. In essence, the tax is a "mirror image" of a gross receipts tax—one that is imposed on a continuing basis upon the activities of storage and use, rather than on an income stream.[2] Whatever technical difference exists between a gross receipts tax and the Kentucky tax on storage and use that is measured by gross rentals is irrelevant to its constitutionality. In either case, without apportionment the tax is impermissibly imposed on out-of-state activity—here, the storage and use of the leased aircraft in other states. *See also Norfolk & Western R. Co. v. State Tax Commission*, 390 U.S. 317, 325 (1968); *Standard Oil Co. v. Peck*, 342 U.S. 382, 385 (1952) (property taxes must be apportioned where the property is subject to taxation by more than one jurisdiction). Apportionment of the Kentucky tax is feasible (*cf. Goldberg v. Sweet*, 488 U.S. at 264-66) and required by the Constitution.

Kentucky's failure to apportion its storage and use tax violates not only the fair apportionment prong of *Complete Auto*, but also the fourth prong of that test—the requirement that the tax be "fairly related" to the services provided by the state. In *Commonwealth Edison Co. v. Montana, supra*, the taxpayer challenged Montana's coal severance tax on several grounds, including the allegation that the amount of the tax far exceeded the value of the services provided by the state. The Court emphatically rejected that contention, explaining that the fourth prong of *Complete Auto* is "closely connected to the first prong," in that it focuses on the nexus between the state and the activity being taxed. 453 U.S.

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[2] The Kentucky statute itself appears to treat the use tax as indistinguishable from a gross receipts tax—for example, describing amounts exempted from the computation of the tax in terms of "gross receipts." *See* Ky. Stat. Ann. § 139.470 (Michie 1991). Similarly, in its brief in the Kentucky Court of Appeals below (at 14), the state described the tax at issue here as imposed "upon the gross receipts from a lease or rental agreement."

at 626. The fourth prong establishes "that the *measure* of the tax must be reasonably related to the extent of the contact, since it is the activities or presence of the taxpayer in the State that may properly be made to bear a 'just share of state tax burden.'" *Id.*, quoting *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938) (emphasis in original). Specifically, the tax must be "assessed in proportion to a taxpayer's activities or presence in a State." 453 U.S. at 627.

Montana's coal severance tax satisfied this standard because the activity being taxed, the mining of coal, occurred entirely in Montana. *Id.* at 626. But the situation is very different with respect to Kentucky's use tax. Ashland pays the same use tax, based on 100% of its gross rental payments, that it would if the storage and use of the leased aircraft were entirely intrastate; the tax does not vary at all with the level of in-state activity. The Kentucky use tax thus presents a classic example of the constitutional defect described by the Court in *Commonwealth Edison*: "[W]hen the measure of a tax bears no relationship to the taxpayers' presence or activities in a State, a court may properly conclude under the fourth prong of the *Complete Auto Transit* test that the State is imposing an undue burden on interstate commerce." *Id.* at 629.

In this respect, the tax here is closely analogous to the "flat taxes" on highway users struck down by this Court as discriminatory in *American Trucking Associations, Inc. v. Scheiner, supra.* Taxpayers who used both Pennsylvania highways and out-of-state highways paid precisely the same tax as taxpayers who used Pennsylvania highways exclusively. The Court explained that those taxes "discriminate against out-of-state vehicles by subjecting them to a much higher charge per mile traveled in the State." 483 U.S. at 290. Because the amount of the tax "does not vary directly with miles traveled or with some other proxy for value obtained from the State,"

the Pennsylvania taxes failed the fourth prong of the *Complete Auto* test as explicated in *Commonwealth Edison*. *Id.* at 291.

The same is true of the Kentucky use tax as applied to gross rentals; taxpayers like Ashland who store and use their leased aircraft both inside and outside Kentucky pay precisely the same tax as taxpayers who store and use their leased aircraft exclusively within the state. The taxpayers engaged in interstate activity thus pay a higher per activity charge in Kentucky and therefore, like the interstate truckers in *American Trucking*, are unconstitutionally forced to pay tax disproportionate to the services they receive from the state.

2. The Kentucky Court of Appeals did not address these constitutional defects in the State's tax scheme. The court brushed off Ashland's claim with the blithe assertion that no other state has "the requisite substantial nexus necessary to impose a tax" and therefore "there has been no showing of the risk of multiple taxation that [the fair apportionment] prong of the *Complete Auto Transit* test was designed to prevent." Pet. App. 7a.

The court's assertion is unfounded. Although the leased aircraft are based in Kentucky, they spend considerable time being stored and used in other states. During that time, those states provide protection and other services to the aircraft, which gives them a sufficient nexus to tax Ashland on the storage and use of the aircraft. *See, e.g., Braniff Airways, Inc. v. Nebraska Bd. of Equalization*, 347 U.S. 590, 600-02 (1954); *Standard Oil Co. v. Peck*, 342 U.S. at 384. Moreover, even the Kentucky court did not dispute that a use tax could have been imposed by the state in which the leased airplanes were delivered and first used before they ever appeared in Kentucky. *See* Pet. App. 7a. There thus can be little doubt that Kentucky is not the only state with sufficient nexus to be able to tax Ashland's storage and use of leased aircraft, and therefore that Kentucky's taxation of

the rental payments on an unapportioned basis creates a risk of multiple taxation.[3]

The Kentucky Court of Appeals also stated that, if there were a risk of multiple taxation, Ashland "would then be entitled to a credit or exemption pursuant to KRS 139.510 as it is applied by the Cabinet." Pet. App. 7a. This creative interpretation of Kentucky's credit provision, which by its terms provides a credit only for taxes "substantially identical to the tax levied under KRS 139.200" (that is, sales taxes, not use taxes), does not cure the constitutional defect in Kentucky's unapportioned use tax.

First, the credit found by the court below does not even have the claimed effect of preventing multiple taxation. Kentucky's credit is conditioned on reciprocity; no credit will be given for tax paid to another state "if that state does not grant credit for sales taxes paid in this state." Therefore, regardless of how broadly its credit provision is construed, Kentucky will subject taxpayers to multiple taxation if they pay a second use tax to a state that does not grant a credit for Kentucky taxes.

More fundamentally, the Kentucky court erred because "multiple taxation" is not the only, or most significant, constitutional problem with its unapportioned tax. The core defect is that Kentucky is taxing out-of-state activity, and a credit mechanism does nothing to address that defect. If one state, for whatever reason, does not tax in-state activities, a second state is not free to "fill the gap" and tax the activity through the expedient of saying that it will give a credit for taxes paid to another state. For example, if New Hampshire chooses not to

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[3] That risk is not merely theoretical. Most states impose a use tax on the lease or rental of tangible personal property. *See* William A. Raabe & Karen J. Boucher, *1998 Multistate Corporate Tax Guide*, Vol. II, at 311-17.

have an income tax, Vermont cannot tax income attributable to New Hampshire, even if it affords a credit. *See Goldberg v. Sweet*, 488 U.S. at 270 n.3 (Stevens, J., concurring) ("That one state through which interstate commerce flows may not constitutionally tax such commerce does not mean that another State may make up for the gap, as it were, by taxing its share as well as the first State's share."); *Northwest Airlines, Inc. v. Minnesota*, 332 U.S. 292, 326 (1944) (Stone, C.J., dissenting) ("The extent to which one state may constitutionally tax the instruments of interstate transportation does not depend on what other states may happen to do, but on what the taxing state has constitutional power to do.").[4]

The same principle applies here. As explained in point 1, Kentucky has violated the territorial limitations of the Commerce and Due Process Clauses in imposing a tax on the storage and use of leased aircraft in another state. Asserting that it will grant a credit cannot operate to extend the reach of Kentucky's taxing power to cover activity beyond its borders.

3. This Court's recent decision in *Oklahoma v. Jefferson Lines, Inc.*, No. 93-1677 (Apr. 3, 1995), addresses an issue related to the one presented here, and the Court's opinion further demonstrates the error by the Kentucky court below. In *Jefferson*, the Court upheld Oklahoma's imposition of an unapportioned sales tax on the purchase price of a ticket for interstate bus transportation. The Court ruled that the special character of sales taxes relieves them from the apportionment requirement that attaches to most other taxes—like gross receipts, property, or taxes on activities.

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[4] The Court has effectively overruled the holding of *Northwest Airlines* in favor of "a rule of fair apportionment among the States." *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 442 (1979). The Court has treated Chief Justice Stone's dissenting opinion in *Northwest Airlines* as an accurate statement of current Commerce Clause doctrine. *Id.* at 443, 452 n.17, 455.

The Court emphasized that a sale is a "discrete event" (slip op. 11) that is consummated at one time and "properly treated as unique" (*id.* at 13). A sale entails "agreement, payment, and delivery of some of the services in the taxing State; no other State can claim to be the site of the same combination." *Id.* at 15. Therefore, a sales tax does not present the same "opportunit[y] . . . for multiple taxation of the same taxpayer" that is present in the case of other kinds of taxes. *Id.* at 14-15. The Court concluded that Oklahoma's unapportioned sales tax is constitutional because it "reach[es] only the activity taking place within the taxing State, that is, the sale of the service." *Id.* at 21-22.

The holding of *Jefferson* has no bearing on this case. Kentucky's tax is not a sales tax, nor is it imposed on any other "discrete event." It is a recurring charge, not a one-time assessment, that is imposed on a continuing basis on the activity of storage and use of leased property —activity that undeniably occurs in many states other than Kentucky. Indeed, the analysis of *Jefferson* confirms that the Kentucky use tax must be apportioned. Because the tax does not "reach[] only the activity taking place within" Kentucky, it fails the standard of "external consistency" set forth in *Jefferson*. *Id.* at 21-22.

Moreover, the *Jefferson* decision confirms that Kentucky's tax cannot be reconciled with the discrimination prohibition elucidated in *American Trucking Association v. Scheiner*, *supra*. The Court distinguished *Scheiner* because the Oklahoma sales tax was "imposed not upon the use of the State's roads, but upon" the sale event. *Id.* at 24. In this case, however, the tax by its terms is imposed upon the storage and use of the property, activities that necessarily invoke the protections of the state in which they occur. Although mileage was not "a relevant proxy" (*id.*) for the state-conferred benefits associated with the sale in *Jefferson*, here the level of storage and use in Kentucky is "a relevant proxy" for the benefits

conferred by the state in connection with the storage and use of the aircraft.

Finally, the Court in *Jefferson* reconfirmed that the fourth prong of *Complete Auto* turns on whether the measure of the tax varies with the level of activity in the state, as set forth in *Commonwealth Edison v. Montana*, 453 U.S. at 626-29. In *Jefferson*, that prong was satisfied because the "sale . . . takes place wholly inside Oklahoma." *Id.* at 25. In this case, by contrast, much of the taxable activity takes place outside of Kentucky, but the state measures the tax as if all the activity occurred within the state.

Because the court below did not have the benefit of this Court's most recent exposition of the relevant principles in the *Jefferson* decision, the Court may wish to consider vacating and remanding this case for reconsideration in light of *Jefferson*.

4. The issue presented here warrants review by this Court. As noted earlier (at 11 n.3), most states have statutes that impose a tax on the storage and use of leased tangible personal property like aircraft. If the decision of the Kentucky Court of Appeals is permitted to stand, it will set a precedent that likely would lead at least some of these states also to apply their use taxes in an unconstitutional manner. *See Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 72 (1963); *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. at 439.

Although we are not aware of any other state court to consider the precise issue presented here, the lower court's approval of Kentucky's unapportioned taxation of periodic lease payments is at odds with decisions in other states that recognize the need for apportionment of recurring taxes that extend to out-of-state activities. The California Supreme Court's decision in *Flying Tiger Line, Inc. v. County of Los Angeles*, 333 P.2d 323, 51 Cal. 2d

314 (1958), *cert. denied*, 359 U.S. 1001 (1959), is instructive. In that case, the county sought to impose an unapportioned property tax on planes permanently based in California but regularly flown in interstate and foreign commerce. The California court held the tax assessment unconstitutional, explaining that the owner was "entitled to an assessment on an apportionment basis if the record shows that he was, during a tax year, receiving substantial benefits and protection in more than one state." 333 P.2d at 326, 51 Cal. 2d at 319. Notably, with respect to planes that were *leased*, the county acknowledged from the outset that the tax had to be apportioned. *See* 333 P.2d at 324, 51 Cal. 2d at 316. The contrast between California's and Kentucky's view of apportionment reflects a level of disarray among state courts on this important issue that will only increase if this Court allows the erroneous decision below to stand.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider vacating the judgment below and remanding for reconsideration in light of its decision in *Oklahoma v. Jefferson Lines, Inc.*, No. 93-1677 (Apr. 3, 1995).

Respectfully submitted,

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APRIL 1995

APPENDIX A

[Rendered: July 29, 1994]

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

No. 92-CA-3033-MR

REVENUE CABINET, COMMONWEALTH OF KENTUCKY,
Appellant

v.

ASHLAND OIL, INC.,
Appellee

Appeal from Greenup Circuit Court
Honorable James W. Lyon, Sr., Judge
Action No. 91-CI-219

OPINION REVERSING AND REMANDING

* * * *

BEFORE: LESTER, Chief Judge; DYCHE and WILHOIT, Judges.

DYCHE, JUDGE. The Revenue Cabinet ["Cabinet"] appeals from an opinion and order of the Greenup Circuit Court entered November 18, 1992, which reversed a February 15, 1991, Board of Tax Appeals order upholding an assessment of use tax made by the Cabinet against Ashland Oil, Inc. The Greenup Circuit Court found that the Cabinet erred in assessing a second tax with respect to three aircraft leased by Ashland Oil upon

which a use tax had already been paid, and that the Cabinet erred in attempting to tax the entire amount of gross receipts derived from interstate commerce upon a total of seven aircraft being leased to and used by Ashland Oil in Kentucky.

The facts of the case are not in dispute. Ashland Oil, a Kentucky corporation and appellee herein, leased the seven aircraft in question from Ash Property, Inc., an Ohio corporation and subsidiary of Ashland Oil. The lease agreements, which were entered into outside Kentucky, provided for initial lease terms of five or seven years and gave Ashland Oil the option to renew each lease for additional periods of time. Appellee took delivery of the aircraft in Kansas and, pursuant to the express terms of the lease agreements, they were thereafter based at an airport in Worthington, Kentucky.

Two groups of aircraft are involved. The first group consists of three Sabreliner and Beechcraft King Aire aircraft. Ash Property purchased these planes before August 1, 1985, and then leased them, also before August 1, 1985, to appellee. These lease agreements were renewed after July 31, 1985, thereby triggering the application of KRS 139.532(2)[1] resulting in a use tax assessment.

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[1] KRS 139.532 entitled "Applicability of sales or use tax to gross receipts from various sources" reads as follows:

(1) Gross receipts from the lease or rental of tangible personal property are exempt from sales or use tax if the receipts are:

(a) Derived from a lease or rental agreement entered into before August 1, 1985; and

(b) The sales or use tax applicable to the purchase price of the property was paid prior to August 1, 1985.

(2) Gross receipts from lease or rental agreements for tangible personal property that are renewed after July 31, 1985, and gross receipts from lease or rental agreements entered into after that date, are subject to sales or use tax.

(3) Notwithstanding the provisions of subsection (1) of this section, lease or rental agreements subject to use tax under the provisions of KRS 139.320 remain subject to tax regardless

A use tax assessment had previously been issued against Ash Property for its original purchase of these three aircraft. Ash Property contested that initial assessment on the ground that it did not use the property within the state. This Court in a non-published opinion styled *Ash Property v. Revenue Department, Commonwealth of Kentucky*, No. 87-CA-1288-S, rendered May 13, 1988, upheld the assessment reasoning that Ash Property had used the aircraft in Kentucky within the meaning of the use tax statutes, specifically KRS 139.190, by leasing them to Ashland Oil [2].

The second group of aircraft consists of four Cessna Citations. In the case of these aircraft, no Kentucky sales or use tax was paid on their original purchase prices. However, these planes' subsequent rental to Ashland Oil by Ash Property and use in Kentucky it is alleged by the Cabinet is subject to use tax under KRS 139.532(2).

On February 15, 1991, the Kentucky Board of Tax Appeals rendered a decision upholding the Cabinet's final ruling and assessment of use tax in the amount of $85,217.00.

Before the Greenup Circuit Court, Ashland Oil argued that the Cabinet's attempt to extract a second use tax for use of the first group of aircraft when the identity of neither the lessor nor the lessee of such aircraft had changed, constituted impermissible double taxation under

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of when such lease or rental agreements were executed. (Enact. Acts 1985 [1st Ex. Sess.], ch. 6, part III, § 10, effective August 1, 1985.)

[2] KRS 139.190 entitled "Use" states:

"Use" includes the exercise of any right or power over tangible personal property incident to the ownership of that property, or by any transaction in which possession is given, except that it does not include the sale of that property in the regular course of business. (Enact. Acts 1960, ch. 5, Art. I, § 19, effective February 5, 1960.)

Kentucky law. Secondly, Ashland Oil contended that the Cabinet's attempt to impose a use tax on 100 percent of the gross receipts derived from interstate commerce, specifically the interstate use of the aircraft, violated the Commerce Clause of the U.S. Constitution because the aircraft were predominantly used outside Kentucky. The Circuit Court agreed.

In its November 18, 1992, opinion, the Circuit Court found that the levy of two use taxes for the privilege of using the same aircraft where both the owner and user of the aircraft remained the same was indeed double taxation, and prohibited as such because it violated the Kentucky Constitution and the public policy against double taxation. As to the second issue, the Circuit Court found the Cabinet's attempt to apply a use tax to the entire *unapportioned* gross receipts derived from interstate commerce to be invalid on Commerce Clause grounds. (Emphasis ours.) Accordingly, the Circuit Court ordered as follows:

> This cause is reversed and remanded to the Cabinet for the sole purpose of calculating the use tax applicable to the second group of aircraft based on the statistical evidence contained in the record as to the uses and values asserted by [Ashland Oil].

Simply put, the Circuit Court ordered that the use tax assessed by the Cabinet on the proceeds derived from interstate commerce be apportioned fairly to reflect only the aircrafts' use in Kentucky. This appeal followed.

Appellant makes two convincing arguments before this Court. It first argues that the assessment of a use tax against Ash Property for the original purchase of the first group of aircraft and the assessment of a use tax against appellee for the aircrafts' subsequent lease does not actually constitute double taxation; and, further, that even if it did, such assessments were specifically contemplated and sanctioned by the Legislature in KRS 139.532 (1) and (2). Secondly, the Revenue Cabinet urges that its assessment of a use tax for appellee's lease of aircraft

used and permanently based in Kentucky does not violate the Commerce Clause; and KRS 139.510, which provides an exemption or credit for use taxes already paid to other states, preserves the constitutionality of the use tax law and validates the use tax assessment of the gross receipts derived from the leases herein.

As for appellant's first argument, the Greenup Circuit Court's conclusion that the use tax assessed upon the renewal of the leases for use of the first group of aircraft in Kentucky constituted double taxation is indeed contrary to well settled law. The assessments in question were issued to two separate and distinct taxpayers for separate and distinct privileges and as such, it is our opinion, they do not constitute double taxation. The two separate and distinct transactions are: 1) the purchase of the aircraft by Ash Property before August 1, 1985; and 2) Ashland Oil's subsequent lease of the planes after August 1, 1985. In *Second Street Properties v. Fiscal Court of Jefferson County*, Ky., 445 S.W.2d 709, 715 (1969), a taxpayer contested the imposition of both a city occupational license tax and a transient room tax. The then Court of Appeals held:

> To constitute double taxation the two taxes must be imposed on the same property by the same governing body during the same taxing period for the same taxing purpose. [Citation omitted.] The tax under consideration does not have a single one of these elements, much less all of them.

The tax assessed in *Ash Property* and the use tax assessed on the renewal of the leases of the first group of aircraft after July 31, 1985, were issued to different taxpayers and were attributable to transactions that took place during different periods of time. Accordingly, there is no double taxation problem. Furthermore, even if we were to conclude there was a double taxation problem herein, our legislature, by enactment of KRS 139.532(1) and (2), has expressly contemplated and sanctioned its imposition. *See Second Street Properties, supra* at 715,

and also *Falls City Brewing Company v. Talbott*, 265 Ky. 541, ——, 97 S.W.2d 57, 59 (1936).

Appellant's second contention of error concerns the Greenup Circuit Court's conclusion that the Cabinet's assessment of a use tax upon the entire amount of gross receipts derived from interstate commerce, specifically the lease and use of the seven aircraft in Kentucky, is invalid on Commerce Clause grounds. Appellant argues that the proration formula or approach advocated by the Circuit Court, whereby the lease and use of the aircraft by Ashland Oil would only be assessed a use tax in an amount that reflects the aircrafts' in-state use, is not authorized by any statutory authority and is, in fact, contrary to the use tax statutes; further, it is argued that the approach adopted by the Circuit Court would be immensely impractical to administer. Finally, appellant contends that Kentucky affords a credit or exemption for use tax paid on a lease to another state, thereby preventing the multiple taxation condemned by the Commerce Clause. Simply stated, we agree with the Board of Tax Appeals that the assessment of the use tax by the Cabinet is constitutionally valid and thereby reject the Circuit Court's analysis to the contrary.

Kentucky's use tax is imposed pursuant to KRS 139.310 which provides:

> An excise tax is hereby imposed on the storage, use or other consumption in this state of tangible personal property purchased . . . for storage, use or other consumption in this state at the rate of six percent (6%) of the sales price of the property.

The amendment enacted by the Legislature effective August 1, 1985, expanded the definition of "purchase" contained in KRS 139.090 to include "lease or rental." As a result, the use tax is now levied on gross rentals paid for tangible personal property rented or leased from an out of state lessor for use within Kentucky.

In *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977), the U. S. Supreme Court enunciated the test a

tax must pass to withstand an attack on Commerce Clause grounds. The tax must: (1) not discriminate against interstate commerce; (2) be applied to an activity or activities with a substantial nexus with the taxing state; (3) be fairly apportioned; and (4) be fairly related to services provided by the state. The central purpose of the apportionment prong is to "ensure that each state taxes only its fair share of an interstate transaction." *See Goldberg v. Sweet*, 488 U.S. 252, 260-61 (1989).

Here, the Circuit Court concluded that the use tax assessed was not fairly apportioned in accordance with *Complete Auto Transit*, given the substantial use of the aircraft outside Kentucky. We reject that conclusion. There is nothing in the record to suggest that any other state has in fact taxed the leases at issue here or the use, storage or other consumption of the aircraft that are the subject of these leases. There is also nothing in the record to lead us to believe that any other state would *now* have the requisite substantial nexus necessary to impose a tax. (Emphasis ours.) In short, there has been no showing of the risk of multiple taxation that this prong of the *Complete Auto Transit* test was designed to prevent. If there were, appellee would then be entitled to a credit or exemption pursuant to KRS 139.510 [3] as it is applied by the Cabinet.

Therefore, the opinion and order of the Greenup Circuit Court is reversed and this matter is remanded thereto for reinstatement of the decision of the Kentucky Board of Tax Appeals.

ALL CONCUR.

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[3] KRS 139.510 states in pertinent part:

The tax levied by KRS 139.310 shall not apply to the storage, use or other consumption of tangible personal property in this state upon which a tax substantially identical to the tax levied under KRS 139.200 . . . equal to or greater than the amount of tax imposed by KRS 139.310 has been paid in another state....

APPENDIX B

SUPREME COURT OF KENTUCKY

94-SC-665-D
(92-CA-3033)

ASHLAND OIL, INC.,
Movant

v.

REVENUE CABINET, COMMONWEALTH OF KENTUCKY,
Respondent

Greenup Circuit Court
No. 91-CI-219

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED January 11, 1995.

/s/ Robert F. Stephens
Chief Justice

APPENDIX C

[Entered Nov. 18, 1992]

COMMONWEALTH OF KENTUCKY
GREENUP CIRCUIT COURT

Civil Action No. 91-CI-00219

ASHLAND OIL, INC.,
Appellant

VS.

REVENUE CABINET, COMMONWEALTH OF KENTUCKY,
Appellee

OPINION AND ORDER

This case is an appeal from an order of the Kentucky Board of Tax Appeals finding the Appellant liable for Kentucky use tax on certain aircraft which it leases from an Ohio corporation.

The facts are not in dispute. Two groups of aircraft are involved. The first group consists of aircraft upon which the use tax has been paid under the pre-August 1, 1985 law. The second group consists of aircraft acquired after the new law became effective August 1, 1985. The August 1, 1985 amendment subjected leases and rentals to the sales and use tax law for the first time, and the first group has now been assessed use tax a second time under this law.

With respect to the second group of aircraft, they were all purchased by the lessor outside the Commonwealth of Kentucky, and delivery was taken in Wichita, Kansas. The leases were entered into outside Kentucky and were

in effect at the time possession was first taken by the Appellant. The aircraft were first used in Kansas when they were flown by the Appellant's pilots in training sessions. Although the aircraft were subsequently hangared at a public airport in Greenup County, the aircraft were actually flown more than eighty percent of the time outside the Commonwealth.

Use tax was paid on the purchase price under the old law on the first group of aircraft, and the Cabinet now seeks to impose use tax on the lease payments made by the Appellant since the law was changed August 1, 1985 on these same aircraft. Appellant contends that the assessment of a second use tax on the first group of aircraft constitutes double taxation and is, therefore, void under Kentucky law. The Cabinet also asserts that use tax is due on the entire amount of the lease payments, while the Appellant contends that it is liable only for use tax on the lease payments attributable to use of the aircraft in Kentucky, and that the assessment of an unapportioned tax on gross receipts derived from interstate commerce, i.e., the lease payments, is invalid under the commerce clause of the federal constitution. The Appellant further contends that the use tax or leases and rentals need not be interpreted to require taxation of the entire gross receipts from the use of the property interstate, as urged by the Cabinet, and that it should apply the statute as urged by the Appellant in order to preserve the constitutionality of the use tax.

The Court finds for the Appellant on both issues.

Conclusions of Law

The Board erred in finding that the assessment of the second use tax on the first group of aircraft did not constitute double taxation and was therefore valid under Kentucky law. It is undisputed that a use tax was paid under the pre-August 1, 1985 law for the privilege of using these aircraft in the Commonwealth of Kentucky.

It is also undisputed that the Cabinet now seeeks an additional use tax for the privilege of using these same aircraft in the Commonwealth. Neither the ownership nor the lessee of the plans has changed since the original tax was assessed and paid. The Court is constrained to find that the extraction of a second tax for the privilege of using certain aircraft in this state where both the owner and user of the aircraft remain the same is indeed double taxation; to find otherwise would be to ignore reality.

It is settled law in Kentucky, amply demonstrated by the cases cited by the Appellant,[1] that double taxation is violative of the Kentucky Constitution as lacking uniformity and that such taxes are invalid on the additional grounds that double taxation is against public policy in this state. The assessment of the second use tax must therefore fall.

The Board also erred in upholding the use tax on the entire gross receipts derived from interstate commerce, i.e., the interstate use of the aircraft in question. After first citing *Complete Auto Transit v. Brady*[2] and listing the four tests which a tax must pass in order to withstand attack under the Commerce Clause of the United States Constitution, the third prong of which is that the tax must be fairly apportioned, the Board holds that the tax in question indeed passes muster. The Court finds this conclusion by the Board remarkable in view of the undisputed evidence in the record that there was *no apportionment whatsoever* with respect to the gross receipts derived from interstate commerce; on the contrary, the use tax has been assessed by the Cabinet on the entire proceeds derived from the leases. It is black letter law

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[1] *Cumberland Telephone & Telegraph Co. v. Hopkins*, 90 S.W. 594 (1906); *City of Louisville v. Aetna Fire Ins. Co.*, 143 S.W.2d 1074 (1940); *Kentucky Power Co. v. Revenue Cabinet*, 705 S.W.2d 90 (1986).

[2] *Complete Auto Transit v. Brady*, 430 U.S. 274, 97 S.Ct. 1076 (1977).

that an unapportioned tax on gross receipts derived from interstate commerce cannot stand. See, e.g., *Complete Auto*, supra, cited by the Board as authority for its holding, and other cases too numerous to mention. Insofar as the Court can determine, none of the cases cited by the Cabinet and the Board involve the taxation of interstate gross receipts and they are therefore not in point.

It should also be noted that, while the Board rested its order in part on the lack of a showing of taxes paid other states, no such showing is necessary. The law, as applied to this taxpayer, lacks both internal and external consistency and is therefore invalid without further ado. See *Armco v. Hardesty*.[3]

The Court therefore declares the use tax applied to the second group of aircraft to be invalid as applied to the Appellant. The Court further finds, however, that the statute in question need not be interpreted in the manner urged by the Cabinet. If the statute is interpreted as urged by the Appellant and the tax computed consistently therewith, no violence is done to the commerce clause and the statute is saved. Such an interpretation results in the very apportionment which is lacking in and fatal to the Cabinet's construction of the use tax statute. It being the policy in this Commonwealth to interpret statutes in a manner which preserves, rather than destroys, their constitutional validity, it is so ordered.

There is ample evidence in the record regarding the extent of both the flight time and the ground time of the aircraft in this state, as well as the respective values to the Appellant of such times. The Court finds this evidence to be persuasive and, in the absence of evidence to the contrary, conclusive as to such values absent errors in calculation.

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[3] *Armco, Inc. v. Hardesty*, 467 U.S. 638, 104 S.Ct. 2620 (1984).

ORDER

This cause is reversed and remanded to the Cabinet for the sole purpose of calculating the use tax applicable to the second group of aircraft based on the statistical evidence contained in the record as to the uses and values asserted by the Appellant. The Court further directs the Appellant to permit Cabinet representatives to review its aircraft log books, related work papers, and calculations if it so desires, in order to determine the accuracy of the statistical evidence presented by the Appellant, which shall be conclusive absent demonstrable arithmetic or clerical error, in which case appropriate corrections shall be made.

Date Nov. 18, 1992

/s/ James W. Lyon, Sr.
JAMES W. LYON, SR.
Judge
Greenup Circuit Court

APPENDIX D

KENTUCKY BOARD OF TAX APPEALS

File No. K89-R-1081

ASHLAND OIL, INC.,
Appellant

VS.

REVENUE CABINET, COMMONWEALTH OF KENTUCKY,
Appellee

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER NO. K-13797

This cause coming on for hearing before the Board, and the Board having considered the evidence in the record, including the briefs filed on behalf of the parties, now makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. This is a use tax case. The statute imposing the tax is KRS 139.310. Ashland Oil, Inc. appeals from the Revenue Cabinet's August 24, 1989 final ruling that upheld a use tax assessment of $154,007.00 (plus interest) for the audit period August 1, 1985 through September 30, 1986. The assessment was attributable to Ashland Oil's leases or rentals of airplanes, computer equipment and office equipment. (By amendments effective August 1, 1985 to KRS 139.090 and 139.120, the sales and use tax was extended to bona fide leases, rentals and other transfers of possession of tangible personal property that were not in lieu of transfers of title, exchanges or barters. 1985 Ky. Acts, Ch. 6 (Part III) §§ 6 and 7. See also 103 KAR 28:051).

2. A hearing was held in this case on August 15, 1990. Testimony was presented and exhibits admitted into evidence on behalf of both parties. At this hearing, it was disclosed that the amount of tax in controversy had been reduced to $85,217.00 This reduction represented the tax attributable to leases (of the computer and office equipment and one airplane) that had been entered into before August 1, 1985. See KRS 139.532(1).

3. The remaining portion of the tax assessment (which is still at issue) represents the application of use tax to the amounts paid by Ashland Oil under leases of aircraft that were renewals or amended versions of leases originally entered into before August 1, 1985. The renewals or amended versions were entered into after August 1, 1985 and during the audit period. See KRS 139.532(2). A renewed or amended lease on one of the eight planes originally involved in this tax appeal was not entered into until after the audit period. Thus, during the audit period, its use, storage or other consumption was governed by a lease entered into before August 1, 1985. Accordingly, the tax assessment was reduced pursuant to KRS 139.532(1).

4. All seven aircraft whose rentals remain the subject of this appeal were leased by Ashland Oil from Ash Property, Inc., a subsidiary of Ashland Oil. These leases or rentals were governed by agreements admitted in evidence as Appellee's Ex. 1 and are hereby incorporated in these findings by reference. Ashland Oil received possession of these planes under these leases in Kansas or at some other point outside Kentucky. The aircraft were thereafter permanently based in Worthington, Kentucky. A common provision (¶ 5) of the applicable leases contained the following (or very similar) language:

> 5. DELIVERY: Lessor shall deliver possession of the Aircraft to the Lessee, at St. Louis, Missouri on August 11, 1980. The Aircraft shall be perma-

> nently based at Ashland-Boyd County Airport, Kentucky, and such permanent base location shall not be changed without the prior written consent of the Lessor and any holder of a mortgage or other security interest on said Aircraft. At the termination of this Lease, Lessee shall redeliver possession of the Aircraft at Ashland-Boyd County Airport, Kentucky or at such other location as may be mutually agreeable to the parties.

Under the terms of these lesses, the rental payments made by Ashland were fixed sums payable yearly or monthly.

5. For purposes of the issues raised by Ashland Oil, the seven aircraft can and should be broken down into two groups. The first group consists of three Sabreliner and Beechcraft King Aire aircraft. These airplanes were purchased by Ash Property and then leased or rented to Ashland Oil. The initial lease agreements were entered into before August 1, 1985 and, as we have already seen above, renewals or amended versions of these initial leases were entered into after August 1, 1985. (Again, as we have seen, Ashland Oil's payments under the latter leases, the renewals entered into after August 1, 1985, were the ones for which tax has been assessed here. See KRS 139.532(2)). Use tax was assessed against Ash Property for its original purchase of these three aircraft under the pre-August 1, 1985 law. KRS 139.310; 139.130. This assessment was ultimately upheld by the Court of Appeals. *Ash Property, Inc. v. Revenue Cabinet,* KY TAX REPORTER (CCH) ¶ 201-838 (Ky. Bd. Tax App., Order No. K-10868, June 14, 1985), *reversed sub nom. Revenue Cabinet v. Ash Property,* 85-CI-1143 (Franklin Cir. Ct. June 5, 1987), *affirmed sub nom. Ash Property, Inc. v. Revenue Cabinet,* 87-CA-1288-S (Ky. Ct. App., May 13, 1988). It was finally paid by Ash Property in December, 1988 under the aegis of the Kentucky Tax Amnesty Program (KRS 131.400-131.445).

6. The other group consisted of four Cessna Citation aircraft. What has already been said above equally applies to these planes—except that no sales or use tax was paid by Ash Property on the original purchase or sales prices of these aircraft.

7. No proof was offered by Ashland Oil to show or even suggest that other states' sales or use taxes (or equivalent or similar taxes) were paid or assessed for the leases at issue here or for the use, storage or other consumption of the aircraft involved in this case.

CONCLUSIONS OF LAW

1. Use tax is clearly applicable to Ashland Oil's rentals or leases of aircraft for use, storage or other consumption in this state. KRS 139.310; 139.090; 139.130; 103 KAR 28:051. The events triggering the tax's application are not limited to the actual use or flying of the aircraft—they include the planes' storage as well. Here, there can be no doubt that these aircraft were permanently based or stored in this state. The lion's share of their ground time was spent here. In addition, a significant amount of actual flight occurred in Kentucky. Finally, application of the use tax here is unquestionably contemplated and required by KRS 139.532(2).

2. Insofar as the Sabreliner and Beechcraft King Aire aircraft are concerned, no double taxation is presented by the assessment of use tax for leases or rentals that commenced after August 1, 1985, and the previous tax assessment in the *Ash Property* case that was attributable to Ash Property's initial purchase of these planes. These tax assessments were issued to two separate and distinct taxpayers for separate and distinct privileges. See, e.g., 68 AM.Jur.2d *Sales and Use Taxes* § 36; *Shanks v. Kentucky Independent Oil Co.*, 225 Ky. 303, 8 S.W.2d 383 (1928); *Falls City Brewing Co. v. Talbott*, 265 Ky. 541, 97 S.W.2d 57 (1936); *Malco Theatres, Inc. v. Revenue*

Cabinet, KY TAX REPORTER (CCH) ¶ 202-088 (Ky. Bd. Tax App., Order No. K-12899, July 21, 1989); *Boise Bowling Center v. State,* 93 Idaho 367, 461 P.2d 262 (1969); *Waterbury Motor Lease v. Tax Commissioner,* 174 Conn. 51, 381 A.2d 552 (1977).

In any event, if double taxation can be said to exist here, it is expressly contemplated and sanctioned by KRS 139.532(1) and (2). *Second Street Properties v. Fiscal Court of Jefferson County,* Ky., 445 S.W.2d 709, 715 (1969).

3. Ashland Oil also raises a number of constitutional challenges to the assessment of tax at issue here. Although it invokes a number of constitutional provisions, its attack is in essence grounded in the United States Constitution's commerce clause. To withstand attack under this provision, a tax must

1) not discriminate against interstate commerce;

2) be applied to an activity or activities with a substantial nexus with the taxing state;

3) be fairly apportioned; and

4) be fairly related to services provided by the state.

Complete Auto Transit v. Brady, 430 U.S. 274, 288, 97 S.Ct. 1078, 51 L.Ed.2d 326 (1977). The foregoing test has been applied in a number of recent cases (one recently decided by the Board) involving essentially the same or similar statutory schemes and essentially the same or similar factual situations. *H.A.C., Inc. v. Revenue Cabinet,* KY TAX REPORTER (CCH) ¶ 201-901 (Ky. Bd. Tax App., Order No. K-11301, December 17, 1986); *Great American Airways v. Nevada State Tax Commission,* 705 P.2d 654 (Nev. 1985); *Archer Daniels Midland Co. v. Department of Revenue,* 170 Ill.App.3d 1014, 120 Ill. Dec. 828, 524 N.E.2d 1010 (1988); *Whitcomb v. Commissioner of Taxes,* 144 Vt. 466, 479 A.2d 164

(1984); *H.K. Porter Co. v. Commonwealth*, 11 Pa. Commonwealth Ct. 463, 534 A.2d 169 (Pa. Commw. Ct. 1987); *Director of Revenue v. Superior Aircraft Leasing Co.*, 734 S.W.2d 504 (Mo. 1987). We conclude, like we have before in the *H.A.C.* case and like the courts in the cases just cited, that the assessment of tax at issue is constitutionally valid. Accordingly, Ashland Oil's constitutional attack is rejected.

ORDER

In light of the findings of fact and conclusions of law rendered above, the Revenue Cabinet's final ruling is AFFIRMED and its assessment of use tax is upheld.

This 15th day of February, 1991.

FULL BOARD CONCURRING.

/s/ Victoria C. Coleman
VICTORIA C. COLEMAN
Executive Director

(2)

No. 94-1661

Supreme Court, U.S.
FILED
MAY 15 1995
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

ASHLAND INC. - - - - - - - - Petitioner

versus

REVENUE CABINET,
COMMONWEALTH OF KENTUCKY - Respondent

On Petition for a Writ of Certiorari
to the Commonwealth of Kentucky, Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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May ~~22~~ 15, 1995

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JP

QUESTION PRESENTED

Whether Kentucky's imposition of use tax for the Petitioner's lease of corporate aircraft for use, storage and other consumption in Kentucky, based upon the application of the tax rate to the full purchase price or rental of the aircraft, violates the fair apportionment prong of the *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S 274 (1977) four-part test for the validity of a tax under the United States Constitution's Commerce Clause.

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Square D Co. v. *Johnson*, 233 Ill.App.3d 1070, 175 Ill.Dec. 221, 599 N.E.2d 1235 (1992) 9

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Statutes:

1985 Ky.Acts., Ch. 6 (Part III) §§ 6 and 7 2

K.S.A. §79-3606(k)(1989) 2

Ky.Rev.Stat.Ann. §§ 139.090; 139.120 (Michie (1991) 2

Ky.Rev.Stat.Ann. §§ 139.310; 139.190; 139.150; 139.130 (Michie 1991) 4

Miscellaneous:

II Jerome R. Hellerstein and Walter Hellerstein, State Taxation - Sales and Use, Personal Income, and Death and Gift Taxes, ¶ 16.01 (1992) 3

No. 94-1661

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

ASHLAND, INC. - - - - - - - - - *Petitioner*

v.

REVENUE CABINET,
COMMONWEALTH OF KENTUCKY - - - *Respondent*

On Petition for a Writ of Certiorari to the Commonwealth of Kentucky, Court of Appeals

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The Respondent accepts the statement of the case as set forth by Ashland Inc., except as clarified and modified below.

The Petitioner, Ashland Inc., formally Ashland Oil, Inc., leased seven aircraft from Ash Property, Inc., an Ohio corporation and subsidiary of Ashland. The lease agreements, which were entered into outside Kentucky, provided for initial lease terms of five or seven years and gave Ashland the option to renew each lease for additional periods of

time. The lease payments made by Ashland were fixed sums payable yearly or monthly.

Ashland took delivery of the aircraft in Kansas.[1] Tr. 7-8; Appellee's Tr. Exh. 1. Pursuant to the express terms of the lease agreements, the aircraft were thereafter "permanently based at [the] Ashland-Boyd County Airport" in Worthington, Kentucky. Tr. 13; Appellee's Tr. Exh. 1 (¶5 of each lease agreement making up this exhibit).

Kentucky use tax was assessed to Ashland in accordance with Ky.Rev.Stat.Ann. § 139.310 (Michie 1991) by applying the tax rate then in effect (5%) to the "sales price" of the property that had been "purchased for storage, use or other consumption in this state."[2] The purpose of this tax is to complement the sales tax—i.e., to act as a backstop or "dragnet to catch transactions that have escaped the sales tax, as in the instance of untaxed purchases in or from other states." *Commonwealth ex rel Ross* v. *Lee's Ford Dock*, 551 S.W.2d 236, 237 (Ky. 1977); *George* v. *Scent*, 346 S.W.2d 784, 788 (Ky. 1961). This is, of course, one of the primary purposes generally recognized as underlying use tax laws. *See, e.g., Minneapolis Star and Tribune Co.* v. *Minnesota Commissioner of Revenue*, 460 U.S. 575, 581-82

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[1] Kansas law provides an exemption from its sales tax for ". . . aircraft sold and delivered in this state to a bona fide resident of another state, which . . . aircraft is not to be registered or based in this state and which . . . aircraft will not remain in this state more than 10 days." K.S.A. §79-3606(k)(1989).

[2] By legislation effective August 1, 1985, Kentucky amended its statutory definitions of "purchase" and "sale" to embrace bona fide leases or rentals. Ky.Rev.Stat.Ann. §§ 139.090; 139.120 (Michie 1991); 1985 Ky.Acts., Ch. 6 (Part III) §§ 6 and 7. The effect of this legislation was to expand the scope of both the sales and use tax to include bona fide leases or rentals as transactions resulting in the imposition of those taxes. *See also* KRS 139.200; 130.100(1)(a) 1 (Michie 1991); 103 Ky.Admin.Reg. 28:051.

(1982); *Associated Industries* v. *Lohman*, 511 U.S. ____, 114 S.Ct. 1815, 1821, 128 L.Ed.2d 639, 647 (1994); II Jerome R. Hellerstein and Walter Hellerstein, *State Taxation - Sales and Use, Personal Income, and Death and Gift Taxes*, ¶ 16.01 (1992).

In opposition to this use tax assessment, Ashland argued below that under the United States Constitution's Commerce Clause, use tax could be applied only to a portion of the aircraft rental payments based upon an apportionment or proration formula it had devised. In support of its position, Ashland offered evidence tending to show that between 14 and 24% of the airplanes' flight time was spent in Kentucky. Tr. 23, 25-27; Appellant's Tr. Exhs. 1 and 2. This proof also showed, however, that the great majority of the planes' time on the ground (between 67% and 82%) was spent in Kentucky. *Id; see also Ashland* Pet. 17a (the Kentucky Board of Tax Appeals concluding that "[t]he lion's share of [the planes'] ground time was spent [in Kentucky]"). There was no evidence offered of the *actual time* that planes were on the ground or in flight, in Kentucky or elsewhere. Instead, Ashland's evidence spoke strictly in terms of percentages. Appellant's Tr. Exhs. 1 and 2. As one of Ashland's witnesses explained:

> In other words, out of that 24 hours, the plane may have been in the air 3 hours. And that would only leave 21 hours of ground time. So if the airplane, say, was in Kentucky 10 and a half hours out of that 21, then 50 percent of the time would have been Kentucky ground time.

Tr. 33; *see also* Appellant's Tr. Exhs. 1 and 2.

The apportionment formula advocated by Ashland Oil assigned much greater weight or value to flight time than ground time. Tr. 16-21; Appellant's Tr. Exhs. 1 and 2. Specifically, this formula allotted a value of 90% of the lease payment for a given aircraft to flight time and a

value of 10% of the lease payment to ground time. *Id.* The payment terms of these leases, however, were fixed sums payable monthly or yearly and were *not* based upon whether or for how long the planes were flown. Appellee's Tr. Exh. 1; Tr. 13-19, 29-30. Furthermore, there is nothing in the relevant use tax statutes that authorizes the assigning of different weights to use and storage, as Ashland's formula sought to do. Ky.Rev.Stat.Ann. §§ 139.310; 139.190; 139.150; 139.130 (Michie 1991).

Under Ashland's formula, use tax would be applied to only a small portion of the lease payments. Appellant's Tr. Exh. 2. This portion bore little, if any, relationship to the *actual time* spent by these planes in Ashland's possession in Kentucky. Under the example given by the Ashland witness, *supra*, this formula would have permitted only 5% of the lease payment (50% Kentucky ground time x 10% value of ground time) to be taxed for Kentucky ground time—even though the plane in question was on the ground in Kentucky for over 40% (10_ hours) of the *actual time* it was in Ashland's possession during that period.

In the proceedings below, Ashland did not introduce any evidence establishing or even suggesting that any other state has in fact taxed or threatened to tax the leases involved in this case or the use, storage or other consumption of the aircraft that were the subject of these leases. Ashland also did not offer any evidence demonstrating that any other particular state would have had the requisite substantial nexus necessary to impose such a tax.[3]

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[3] Occasional landings and takeoffs, overflight or other insubstantial presence or activity would not have sufficed to establish this nexus. *See Goldberg v. Sweet*, 488 U.S. 252, 263 (1989); *cf. Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954); *Quill Corp. v. North Dakota*, 504 U.S. ____, 112 S.Ct. 1901, 119 L.Ed.2d 91 (1994).

REASONS FOR DENYING THE WRIT

In holding that the use tax in question did not violate the fair apportionment prong of the four-part test enunciated in the *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), the Kentucky Court of Appeals decided the issue before it in a manner wholly consistent with, and supported by, this Court's decisions. Moreover, this Court has just rendered a decision discussing at length the relevant constitutional analysis and principles. *Oklahoma Tax Commission* v. *Jefferson Lines, Inc.*, 115 S.Ct. 1331 (1995). That decision fully supports the Kentucky court's holding, which was also consistent with the decisions of a number of other state courts that have considered the issue raised by Ashland in this case.

Therefore, special and important reasons for this Court's review do not exist in this case. Ashland's Petition for a Writ of Certiorari should be denied.

I. The Application of Kentucky's Use Tax in This Case Does Not Violate the Commerce Clause.

This case presents nothing more than the straightforward application of a state's use tax. In *National Geographic Society* v. *California Board of Equalization*, 430 U.S. 551, 555 (1977), a case decided after *Complete Auto Transit*, this Court observed:

> All States that impose sales taxes also impose a corollary use tax on tangible property bought out of State to protect sales tax revenues and put local retailers subject to the sales tax on a competitive parity with out-of-state retailers exempt from the sales tax. *The constitutionality of such state schemes is settled.* . . .

(Emphasis added.)

This Court's very recent decision in *Jefferson Lines supra*, reaffirms the validity of state sales and use tax systems and provides an extensive exposition of the consti-

tutional analysis relevant here. In that decision, this Court points out that in applying *Complete Auto Transit's* fair apportionment prong in the sales tax area, it has "had to set a different course" from the "allocation by percentages" that the "very term 'apportionment' tends to conjure up." 115 S.Ct. at 1339. Furthermore, the Court states that "[w]e have therefore consistently approved taxation of sales without any division of the tax base among different states, and have instead held such taxes properly measurable by the gross charge for the purchase, regardless of any activity outside the taxing jurisdiction that might have preceded that sale or might occur in the future." *Id.*; *see also Wardair Canada, Inc.* v. *Florida Dept. of Revenue*, 477 U.S. 1 (1986); *Delta Air Lines, Inc.* v. *Revenue Cabinet*, 689 S.W.2d 14 (Ky. 1985). Thus, contrary to the theory advocated by Ashland in this case, fair apportionment under *Complete Auto Transit* does not translate into a requirement of formulary apportionment in the sales and use tax context.

This Court proceeds in *Jefferson Lines* to note its longstanding recognition of the validity of use taxes and the purpose of those taxes as "compensat[ing] the taxing state for its incapacity to reach the corresponding sale..." *Id.* at 1343. *See also National Geographic Society, supra; Minneapolis Star and Tribune Co.* v. *Minnesota Commissioner of Revenue, supra; Associated Industries* v. *Lohman, supra.* The Court further observes that a state's allowance of credits or exemptions for similar sales and use taxes paid to other states avoids the risk of multiple taxation that is the concern of the *Complete Auto Transit* test's fair apportionment prong. *Id.* at 1338, 1341-43.

Holding that this case presented no violation of the Commerce Clause, the Kentucky Court of Appeals reasoned that there was no risk of multiple taxation demonstrated to exist in this case and that to eliminate any possibility of

multiple taxation, a credit was available to Ashland under state law for any taxes that may have been paid to other states.[4] *Ashland* Pet. 7a. While the Kentucky Court did not have the benefit of *Jefferson Lines*, its holding is certainly consistent with and supported by that decision as well as other prior decisions of this Court. *See, e.g., D. H. Holmes Co.* v. *McNamara*, 486 U.S. 24, 31 (1988) ("[t]he Louisiana taxing scheme is fairly apportioned, for it provides a credit against its use tax for sales taxes that have been paid to other States"); *Goldberg* v. *Sweet* 488 U.S. at 263-64 (holding that telecommunications tax levied on gross charge of interstate telecommunications was fairly apportioned because "[i]ts economic effect [was] like a sales tax, the risk of multiple taxation [was] low, and actual multiple taxation [was] precluded by [a] credit provision").

Finally, to accede to the theory advocated by Ashland would defeat the use tax's very purpose of equalizing tax treatment between in-state and out-of-state transactions. *See, e.g., Miller* v. *Commissioner of Revenue*, 359 N.W.2d 620 (Minn. 1985), *cert. denied*, 471 U.S. 1116 (1985). Under Ashland's approach, persons renting or buying items within the state would pay tax on the entire purchase price or rental even though they might subsequently use the items outside the state, while those persons leasing or purchasing property outside the state for use inside the state would be able to pay a lower tax pursuant to a proration formula based strictly upon intrastate use. In this

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[4] Ashland complains of the reciprocal nature of the credit. *Ashland* Pet. 11. However, it cites no authority suggesting that this is impermissible. It should be noted that Kentucky is apparently not unique in its requirement of reciprocity. *See, e.g., Williams v. Vermont*, 472 U.S. 14, 22 (1985) (noting that "[t]he District of Columbia and all but three States with sales and use taxes do provide such a credit, *although reciprocity may be required*" (emphasis added)).

latter situation, a portion of the purchase price or rental would, under Ashland's theory, escape taxation altogether to the extent the property's use (or storage) in another state was not of a magnitude (e.g., constituting overflight or some other occasional or insubstantial presence) sufficient to constitute the substantial nexus necessary to impose a tax. Such a result could hardly be squared with the firmly established principle of Commerce Clause jurisprudence that it is ""not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business."" *Complete Auto Transit*, 430 U.S. at 288, *quoting Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250 (1938) and *Colonial Pipeline Co.* v. *Traigle*, 421 U.S. 100 (1975).

II. The Decision of the Kentucky Court of Appeals Does Not Conflict With Any Other State or Federal Court Decision.

Ashland insinuates that there is "a level of disarray among state courts" on the issue it raises. *Ashland* Pet. 15. However, it cites only one case, a 1958 state property or ad valorem tax case, in support of this contention. *Id.* at 14-15. Ashland also does not point to any decision of a United States court of appeals or district court as conflicting with the Kentucky Court of Appeals' disposition of the question presented.

Contrary to Ashland's assertion, the decision reached by the Kentucky court in the present case is consistent with a number of other state courts addressing in sales and use tax contexts the same or essentially the same Commerce Clause claim made by Ashland in this case. *See Great American Airways* v. *Nevada State Tax Commission*, 705 P.2d 654 (Nev. 1985), *cert. denied*, 479 U.S. 817 (1986); *Archer Daniels Midland Co.* v. *Department of Revenue*, 170 Ill.App.3d 1014, 120 Ill.Dec. 828, 524 N.E.2d

1010 (1988); *Square D Co.* v. *Johnson*, 233 Ill.App.3d 1070, 175 Ill.Dec. 221, 599 N.E.2d 1235 (1992); *Whitcomb* v. *Commissioner of Taxes*, 144 Vt. 466, 479 A.2d 164 (1984); *H. K. Porter Co.* v. *Commonwealth*, 111 Pa. Ct. 463, 534 A.2d 169 (1987); *Director of Revenue* v. *Superior Aircraft Leasing Co.*, 734 S.W.2d 504 (Mo. 1987); *KSS Transportation Corp.* v. *Director*, 9 N.J. Tax 273 (1987), *aff'd*, 11 N.J. Tax 89 (1989);[5] *Seaboard World Airlines, Inc.* v. *New York State Tax Commission*, 118 A.D.2d 947, 499 N.Y.S.2d 513 (A.D.3 Dept. 1986); *Kellogg Co.* v. *Department of Treasury*, 204 Mich.App. 489, 516 N.W.2d 108 (1994). Applying the *Complete Auto Transit* four-part test, these courts consistently sustained over Commerce Clause objections use tax assessments involving corporate aircraft such as those in this case.

Thus, there is hardly any "disarray" among the state courts on the issue presented.

CONCLUSION

The Kentucky Court of Appeals in this case correctly decided the constitutional issue before it, in a manner entirely consistent with the reasoning and holdings of this Court's prior decisions. The Kentucky court's decision is also consistent with the holdings of a number of other state courts that have been faced with the same or essentially the same issue. Moreover, this Court has very recently rendered a decision (*Oklahoma Tax Commission* v. *Jefferson Lines*) whose reasoning and analysis fully supports the Kentucky court's holding.

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[5] *KSS Transportation Corp.* was quoted by this Court in *Jefferson Lines*, 115 S.Ct. at 1343.

Thus, there are simply no special and important reasons for this Court's review in this case. Accordingly, Ashland's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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OCTOBER TERM, 1994

ASHLAND INC.,

Petitioner,

v.

REVENUE CABINET,
COMMONWEALTH OF KENTUCKY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH OF KENTUCKY COURT OF APPEALS

REPLY BRIEF FOR THE PETITIONER

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OCTOBER TERM, 1994

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ASHLAND INC.,

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v.

REVENUE CABINET,
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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH OF KENTUCKY COURT OF APPEALS

REPLY BRIEF FOR THE PETITIONER

In its response to our petition, the State of Kentucky diligently defends a proposition that is not at issue in this case -- namely, that a state may impose a "compensating" use tax on the one-time event of the use in the state of an item purchased in another state. Claiming that this proposition is "straightforward" (Br. in Opp. 5), the State asserts that several state courts have upheld the imposition of such taxes on an unapportioned basis and that this Court's decision in

Oklahoma Tax Commission v. Jefferson Lines, Inc., No. 93-1677 (Apr. 3, 1995), is not inconsistent with those decisions.

The difficulty with the State's response is that it does not address the question presented in this case, which does not involve a tax imposed on a one-time event or one that is associated with a purchase in another state. Rather, it involves a tax imposed *on a recurring basis* on the use or storage in Kentucky of items leased in another state. The court below has held that Kentucky can tax the entire value of each periodic lease payment, without apportionment, despite the recurring nature of the tax and the undisputed fact that the aircraft are used and stored for significant periods outside of Kentucky.

That decision is at odds with the principles recently explicated by this Court in *Jefferson*. As we noted in our petition (at 13), the Court ruled that ordinary apportionment principles do not apply to sales taxes because a sale is a "discrete event" (slip op. 11) that is completed at one time and that is "properly treated as unique" (*id.* at 13). The Court's mention of use taxes, which the State relies upon in its response (at 6), referred only to use taxes that are intended "to compensate the taxing State for its incapacity to reach the corresponding *sale*" and therefore are "paired with a *sales* tax." Slip op. 19 (emphasis added). Arguably, such a tax also is imposed on a "discrete event"; the activity being taxed is complete as soon as there is a single in-state use following an out-of-state sale.

But nothing in *Jefferson* supports disregarding apportionment principles in the case of a tax imposed on a continuing basis on the storage and use of items leased in

another state. To the contrary, *Jefferson* indicates that apportionment is required in the case of the storage and use tax at issue here because the taxable activity and the event of taxation occur repeatedly over a period of years. The tax is not imposed on a "discrete event," and it plainly does not "reach[] only the activity taking place within the taxing State." *Id.* at 21-22. *See* Pet. 13-14.

The State's long list of cases from other state courts (Br. in Opp. 8-9) is irrelevant for the same reason. These cases involve use taxes imposed on aircraft or other items *purchased* in other states. The courts viewed the cases as involving a one-time tax imposed as a substitute for a sales tax that would otherwise go uncollected. *See, e.g., Great American Airways v. Nevada State Tax Commission*, 705 P.2d 654, 657 & n.5 (Nev. 1985) (use tax designed "to prevent evasion of the state sales tax"). These cases shed no light on the issue presented here -- a recurring tax imposed upon periodic lease payments where the activity being taxed occurs in other states as well as in Kentucky.[1]

Indeed, to the extent state courts have focused on this distinction between one-time taxes on sales and recurring taxes on lease payments, they have recognized that the distinction may have constitutional significance. In a case recently before this Court, *Fleming Foods of Alabama, Inc. v. Department of Revenue*, 648 So. 2d 577 (Ala. 1994), 1994

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[1] One case cited by the State does involve leased aircraft, but in that case it appears that no activity occurred in other states and the taxpayer did not claim that the tax should be apportioned. *Seaboard World Airlines, Inc. v. New York State Tax Commission*, 118 A.D.2d 947, 948, 499 N.Y.S.2d 513, 515 (A.D. 3d Dept. 1986).

Ala. LEXIS 456, *cert. denied*, No. 94-1226 (Apr. 17, 1995), the state court rejected a constitutional challenge to the imposition of use tax on vehicles purchased in another state. The court emphasized, however, that "[t]he use tax is not a recurring annual tax, but is a one-time tax levied at the same rate as the sales tax and is complementary to the sales tax." 1994 Ala. LEXIS, at *7.

In sum, *Jefferson* holds that the "unique" nature of sales taxes excuses them from the apportionment requirement applicable to most other taxes. Whether or not that holding extends to a use tax imposed, as a complement to a sales tax, on the "discrete event" of the single use of an item purchased in another state is not pertinent here. With respect to the question that is presented by this case -- a recurring tax on the activity of storage and use of leased property -- *Jefferson* indicates that the apportionment requirement cannot be disregarded. As discussed in our petition (at 8-10), Kentucky's unapportioned tax on the storage and use of leased property violates the constitutional limitations on taxation of interstate activity set forth in prior decisions of this Court and reconfirmed and elucidated in *Jefferson*. *See Jefferson* slip op. 24-25; *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266, 290-91 (1987); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 626-27 (1981). The court below did not address these constitutional difficulties, and its decision should not be allowed to stand.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted. The Court may wish to consider vacating the judgment below and remanding for reconsideration in light of its decision in *Oklahoma v. Jefferson Lines, Inc.*, No. 93-1677 (Apr. 3, 1995).

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